

# Protecting the Independence of National Councils of the Judiciary on the EU Level

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2019-09-17T15:16:45

Councils for the judiciary are one of the main targets in political efforts to diminish the independence of the judiciary in several countries. This is primarily because they are responsible for the appointment and promotion of judges, disciplinary sanctions against judges and judicial ethics. Under these attacks councils and judiciaries are tempted to retreat inwardly, and not to open up to society, as any revealed problem or weakness of the judiciary will be used against them by politics and media. However, by retreating they lose support in society, and also become vulnerable for criticism on lack of accountability. To get around this dilemma, councils need a minimum of security as to their independence. Since more and more countries in the Union fail to provide so, it is of the utmost importance that this is dealt with on Union level. The new European Commission should develop rules and policies to safeguard a minimum of independence for councils. The soon to be expected ruling of the CJEU on the Polish council will probably be of help to this endeavour. We recognize that this undertaking will not be easy in the present political context, but that makes it only more urgent.

Political interventions in the independence of the judiciary such as in Poland ultimately aim at removing judges from office and appointing new judges. While councils for the judiciary differ in their tasks, they generally share responsibility for human resource decisions about judges. This is actually the core responsibility of councils in most countries of the EU. As this authority resides in the councils, the struggle between the powers of the state focuses on the control over the council. The course of the struggle depends very much on the way the members of councils are appointed. In many countries in Middle and Southern Europe at the creation of the councils law makers strove for judicial self-governance and distance of the judiciary from politics by giving councils a majority of judicial members that are elected by their peers. This was, for instance, the case in Poland with constitutional and legal protections as strong as they could be.

In that country, the law had to be changed to get at the judges, and this happened: the council was brought under the control of government and parliament by changing the composition of the council and the appointment method. The new council has started many disciplinary procedures against judges. Not everything that is called a council, qualifies as a genuine independent council. This has led the European Network of Councils for the Judiciary (ENCJ) to suspend the membership of the Polish council. Also, the legality of the Polish council is challenged at the CJEU. The Polish case is clear cut. In several other countries like Hungary and Romania councils are also under pressure, often in more subtle ways with covert threats aimed at non-obliging members of councils.

At the same time, it should be recognized that councils are not in all respects performing as they should. A recent [survey](#) of the ENCJ among the judges of Europe about their independence shows for instance that with respect to the core task of appointment and promotion of judges many respondents feel that judges are not appointed and promoted solely on the basis of ability and experience. This response is given for a variety of institutional arrangements (no council, council with judicial members elected by peers and council with judicial members appointed by government/parliament). While the survey also shows that judges generally feel respected by the judicial authorities and much less so by the other state powers, this does not mean that performance is optimal. Also, in the area of accountability in several countries with councils of the judiciary up to 30% of judges are critical and more are uncertain about the way corruption and judicial misconduct are addressed.

A pattern can be observed that weaknesses of the judiciary are used against councils, and councils in response tend to avoid negative news such as in this survey. They tend to retreat behind independence and its formal safeguards at the expense of accountability. This is understandable. It is easy to be accountable in countries where judicial independence is supported and encouraged. It is a different matter when openness is misused to attack independence by political actors and media, the integrity of which is in doubt themselves. This is a dilemma, because in the long run a single focus on independence is a dead end. Accountability is necessary to keep the judiciary sharp, focused on the needs of citizens and thereby close to society, and in the course of time to be respected by society. To improve the work of councils it is extremely important to find a solution for this dilemma. Councils should be in a position to stay their course as to a generous balance of independence and accountability, despite the behaviour of the other state powers and media.

One way of achieving such a position of councils is to provide them with a minimum of security as to their independence. Since more and more countries in the Union are not willing to do so, it is necessary that it is dealt with on Union level. The [CJEU](#) has already decided that independence at the national level is an EU matter, as national judges apply Union law and are thereby EU-judges as well. In some respects the way the independence of central banks is safeguarded can provide inspiration (Treaty on the functioning of the European Union and Statute of the European system of Central Banks and of the European Central Bank). The independence of national central banks is less far reaching than that of the judiciary, but its requirements are made very explicit in the Statute. As an analysis is beyond the scope of this blog, we focus on one of the requirements: the dismissal of governors of a central bank. If a government decides to fire a governor, recourse is possible to the CJEU which would test the decision against the strict legal framework of the statute (art.14.2). This intervention at the national level is made possible and necessary by the responsibilities of the central bank for the implementation of EU monetary policy. Similar reasoning applies to the judiciary and its governing bodies, the councils for the judiciary. As argued above, national judges implement and enforce Union law. Mutual trust is required for the legal system to function. Instead of unceremoniously dismissing the president and other members of the council as happened in Poland, the prospect of judicial review at the EU level would

give governments a strong incentive to respect judicial independence. We are not suggesting to duplicate literally a specific arrangement that applies to central banks, but we want to illustrate that setting standards is very well possible and feasible. Indeed, it has become unavoidable if we want to maintain judicial independence as core value of the EU. We, therefore, urgently call upon the Commission to make minimum standards of independence for councils for the judiciary a priority for its new mandate.

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